STATE OF MICHIGAN

COURT OF APPEALS

SONDRA K. AVERS,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION, d/b/a PONTIAC METAL FABRICATION DIVISION,

Defendant-Appellee.

UNPUBLISHED
June 23, 2005

No. 252397
Oakland Circuit Court
LC No. 2002-041144-CZ

Before: Gage, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

I

On January 31, 2002, at approximately 5:15 pm, plaintiff slipped and fell on the icy steps just outside the loading dock of defendant's Pontiac facility. Plaintiff had first entered the dock area using the same set of steps about an hour and a half or two hours earlier, at which time the steps appeared wet, but not icy. While plaintiff was inside defendant's facility, it became colder, although plaintiff testified that she was unaware of any changes in the weather. Then, immediately after plaintiff exited the same door she had entered, she slipped and fell at the top of the stairs, which had become ice covered. Plaintiff testified that the first time she saw ice on the stairs was while plant paramedics were putting her on a backboard. At that moment, plaintiff stated, she saw defendant's maintenance employees removing the ice and salting the stairs.

Defendant's Health and Safety Incident Report details the accident as follows:

– Steps were ice covered due to the freezing rain
– Steps had not been salted yet (rain just started)
– Driver was not carfull [sic] when existing [sic] the plant

Most significantly, plaintiff admitted in her deposition that, prior to the accident, she would have seen the ice on the step had she looked:

Q. I want you to assume, if you went out the door, and looked down, could you have seen the ice?

A. Assumption, yes.

Defendant moved for summary disposition, arguing that (1) the slippery condition of the stairs was open and obvious, (2) "special aspects" were not present regarding icy stairs that, in Michigan on January 31, would create "a uniquely high likelihood of harm or severity of harm," and (3) defendant had neither actual nor constructive notice of the allegedly dangerous condition. The trial court granted defendant's motion, ruling that the condition was open and obvious and without "special aspects."

II

We review de novo a trial court's decision to grant or deny summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002); *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The trial court must consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in a light most favorable to the nonmoving party. *Id.* Summary disposition in favor of the moving party is warranted when the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.*; MCR 2.116(C)(10),(G)(4). In presenting a C(10) motion, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Id.* The nonmoving party may not rely on mere allegations or denials in pleadings, but must set forth specific facts showing that a genuine issue of material fact exists. *Id*. "If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Id*. at 363.

III

Generally, a premises possessor owes a duty to use reasonable care to protect invitees from an unreasonable risk of harm caused by dangerous conditions on the premises. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001), citing *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). However, this duty does not extend to dangers that are open and obvious, unless special aspects of a condition make even an open and obvious risk unreasonably dangerous, in which case the possessor must take reasonable steps to protect invitees from harm. *Lugo, supra* at 517. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002); *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). Special aspects are those that "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided . . . ." *Lugo, supra* at 519. Neither a common condition nor an avoidable condition is uniquely dangerous. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 8-9; 649 NW2d 392 (2002). Our Supreme Court and

this Court have applied the open and obvious doctrine to snow and ice cases, see *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11; 643 NW2d 212 (2002), and *Joyce, supra*.

IV

Relying on *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99; 689 NW2d 737 (2004), rev'd ____ Mich ____ (June 17, 2005), plaintiff argues that a genuine issue of material fact exists whether the open and obvious doctrine applies to the present circumstances. However, we note that this Court's decision in *Kenny* was recently reversed by our Supreme Court, and, in any event, we conclude that Kenny is factually distinguishable.

Kenny involved "black ice" that was covered by snow and thus "hidden and not observable on encountering it." *Id*. at 111. In contrast, the icy condition in the present case was readily observable and not camouflaged. In this regard, the instant case is similar to *Corey, supra*, where this Court held that icy steps were an open and obvious condition. Here, by plaintiff's own admission, had she looked down, she would have seen the ice. Based on plaintiff's testimony and facts not in dispute, it is reasonable to expect that an average person would have discovered the condition upon casual inspection. *Joyce, supra* at 238-239. Therefore, the trial court correctly granted defendant's motion for summary disposition based on the open and obvious defense.

V

Furthermore, the lower court correctly ruled that the open and obvious condition did not possess "special aspects." Plaintiff presented no evidence of the alleged "special aspects" of the icy stairs that created "a uniquely high likelihood of harm or severity of harm . . . . " *Lugo, supra* at 518-519; *Joyce, supra* at 242-243. Previously, this Court held that a layer of snow on a sidewalk did not constitute a unique danger creating a "risk of death or severe injury," *Joyce, supra* at 243, and that falling down ice-coated stairs likewise does not give rise to the type of severe harm contemplated in *Lugo*. *Corey, supra* at 6-7. Under the *Lugo, supra* at 518-519, definition of "special aspects," ice and snow do not present "a *uniquely high* likelihood of harm or severity of harm." (Emphasis added.) *Joyce, supra* at 241-243.

In view of our disposition, we need not address defendant's additional defense of lack of actual or constructive notice.

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Richard Allen Griffin